

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

76-1559

BAS

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**United States Court of Appeals  
For the Second Circuit**

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UNITED STATES OF AMERICA,

*Appellee,*

v.

ROBERT MICHAELSON,

*Appellant.*

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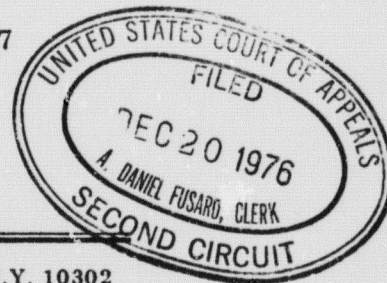
*On Appeal From The United States District  
Court For The Eastern District Of New York*

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**Appellant's Appendix**

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## DOCKET ENTRIES

A-1

REVISED BY: [ ] FOR: [ ] 0860 0208 01 Disp/Sentence (LAST, FIRST, MIDDLE) U.S. TITLE/SECTION 18:371 18:1001 & 2		vs 03-MICHAELSON, ROBERT U.S. MAG. CASE NO. 76-597 Case Filed: 05 25 76 No. of Defs: 07 JUVENILE	
OFFENSES CHARGED Consp. to deal in Firearms. False statements to Gov't. Agency.		ORIGINAL COUNTS 1 2-4	
II. KEY DATES & INTERVALS ARREST or: 5/13/76 Indictment X Information 5-25-76 High Risk Date Summons Served First Appearance Indict Waived In Charging District 5-27-76 9-22-76			
Search Warrant Issued Return Summons Issued Served Arrest Warrant Issued COMPLAINT 5/16/76 MDJ-080 OFFENSE (in Complaint) 18 USC 371, 26 USC 5811, 5812, 5861(e), 18 USC 1001, (2)-VIOLATION OF GUN CONTROL		MAGISTRATE INITIAL APPEARANCE 5/16/76 PRELIMINARY EXAMINATION 5/26/76 REMOVAL HEARING MDJ-080B ACT ATTORNEYS: Robert Gold 791-1942, Barry Slotnick, Esq. 233 Broadway New York, NY	

Show last names and suffix numbers of class defendants on same indictment information. 01-RODRIGUEZ, 02-GERALDO, -4-TOBOCMAN, 03-CAGIANESE, 06-ALVAREZ, 07-CELIS	
DATE (DOCUMENT NO.) 5/16/76 5/21/76 5/25/76 5-27-76 6-3-76 6-17-76 8-20-76 8-27-76	PROCEEDINGS Complaint filed, to retain own counsel. Defendant remanded into the custody of U.S. Marshal in lieu of \$300,000 cash or surety. Defendant released on bail, address: 37 Long Bridge Dr., co-signers: Elaine Michaelson, same address, Norman Goldberg, 37 Ridge Dr., Plainview, N.Y., Judith Goldberg, 37 Ridge Dr., Plainview, N.Y., Ruth Barshop, 5 Kiss Lane, Wantagh, N.Y. Deed to house given to AUSA Robert Gold. Indictment filed, 76 Cr. 503 Deft. present (Atty. present) enters a not guilty plea. 10 days for motions. Bail set cont'd as fixed at \$300,000 co-signed by Elaine Michaelson and 3 others. Case assigned to Duffy, J...Briant, J. Filed notice of appearance by Barry I. Slotnick 233 B'Way NYC 233-5390.. Pre-trial conf. held and concluded. 8-15-76 last day to file motions, trial date 9-20-76...Duffy, J. Pre-trial conference held & concluded. Trial to commence Sept. 20, 1976... DUFFY, J. Filed bill of particulars.



9-14-76

Filed affdvt. of James A. Moss, AUSA in response to the pre-trial motions of deft...

9-20-76

All counsel present.. Trial begun with jury.. case adjd to 9-21-76

9-21-76

Trial cont'd.

9-27-76

✓ Atty. present... Deft withdraws plea of not guilty & PLEADS GUILTY to count 4 only... P.S.I. mordered. Sent. adjd without date.. Bail cont d. Minutes Sealed.... Duffy, J.

11-5-76

Sentencing date for all defts adj to 11-22-76 at 10 A.M. DUFFY, J



DATE	PROCEEDINGS
11-22-76	Filed affdvt. & notice of motion to withdraw plea of GUILTY...Ret. 11-22-76
11-22-76	Filed memorandum of law in support of above motion.
11-23-76	Filed Govt's Affidavit in response to motion of deft Michaelson, dated: 11-19-76 to withdraw his plea of guilty entered on: 9-22-76 to Count 4 of indict & to enter NG plea to that count, etc. by James A. Moss.
11-23-76	Filed Govt's Memorandum of Law on the issues of duress and entrapment of defenses.
11-23-76	Filed memo endorsed on motion filed 11-22-76...The motion is denied. See transcript of 11-22-76...So Ordered.....Duffy, J.....m/n
11-24-76	Filed Order authorizing records of proceedings on 9-22-76, before Duffy, J.-taking of plea of guilty from deft, be "CASH" unsealed. DUFFY, J. m-n
11-30-76	Filed Deft's Notice of Appeal to USCA 2nd Circuit from judgment filed 11-22-76. copy to atty for deft. Barry Ivan Slotnick, 233 Broadway, NYC 10007.



INDICTMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA,

- v -

DOMINICK CAGIANESE, FRANK G.  
ALVAREZ, IRWIN TOBOCMAN, ROBERT  
MICHAELSON, RAYMOND GERALDO,  
MIGUEL D. CELIS, and MANUEL ALFONSO  
RODRIGUEZ,

Defendants.

- - - - - x

INTRODUCTION

1. At all times material to this Indictment the defendant DOMINICK F. CAGIANESE was an American citizen employed as the Director of Aeronautics, Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York.

2. At all times material to this Indictment the defendant FRANK G. ALVAREZ was an American citizen employed by Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York, as its Marketing Director for Latin America.

3. At all times material to this Indictment the defendant IRWIN TOBOCMAN was an American citizen and self-employed businessman conducting his business affairs from his residence located at 415 East 52nd Street, New York, New York.

4. At all times material to this Indictment the defendant RAYMOND GERALDO was a self-employed businessman and an American citizen.



5. At all times material to this Indictment the defendant ROBERT MICHAELSON was an American citizen employed as the President of Wittington Imports, Ltd., Great Neck, New York.

6. At all times material to this Indictment the defendant MIGUEL D. CELIS was a self-employed businessman residing in Sal Salvador, El Salvador, Central America and was a citizen of that country.

7. At all times material to this Indictment the defendant MANUEL ALFONSO RODRIGUEZ was the Chief of Staff of the Armed Forces of El Salvador, Central America, and was a citizen of that country.

COUNT ONE

The Grand Jury charges.

I. THE CONSPIRACY

8. From on or about January 1, 1976 and continuously thereafter up to and including May 15, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOCMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS and MANUEL ALFONSO RODRIGUEZ, the defendants, Howard Peters named herein as an unindicted co-conspirator but not as a defendant, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 26, United States Code, Sections 5811, 5812, 5861(a) and (e) (Title II of the Gun Control Act of 1968) and of Title 18, United States Code, Sections 1001 and 2.



## II. OBJECTIVES OF THE CONSPIRACY

9. The objective of the Conspiracy was to secretly sell weapons, munitions and other implements of war to buyers in the United States in a manner designed and intended to conceal from the United States Department of State and the United States Department of the Treasury the true identities of the buyers.

10. In order to attain their objectives, the members of the conspiracy also agreed to seek to prepare and file with the United States Department of State certain false and fraudulent documents intended to create the false and misleading appearance that certain weapons and munitions were to be purchased by foreign countries for the exclusive use of their armed forces in their national defense.

## III. MEANS OF THE CONSPIRACY

11. Among the means by which the defendants would and did carry out the said conspiracy were the following:

(a) Between, on or about March 20, 1976 and May 15, 1976 the defendants prepared, facilitated the preparation of, and caused to be prepared certain false and fraudulent documents including: (i) an official United States Department of State Form DSP-5, entitled "Application/License for Permanent Export of Unclassified Implements of War..."; (ii) a certificate, dated April 22, 1976, bearing the signature of the defendant Colonel Manuel Alfonso Rodriguez; (iii) a copy of a purchase order for 10,000 submachine guns and 1.5 million rounds of ammunition, dated May 3, 1976, signed by Howard Peters as purchasing agent



on behalf of San Pan Trading Corporation; and (iv) a United States Department of State, Office of Munitions Control, Form DSP-83, entitled "Consignee Purchaser Transaction Statement" signed by the defendant Colonel Manuel Alfonso Rodriguez and bearing his official government seal.

(b) On or about May 5, 1976, the defendants filed facilitated the filing of, and caused to be filed with the United States Department of State the false and fraudulent documents referred to in Subparagraphs 11(a)(i), (ii) and (iii) above.

#### OVERT ACTS

In furtherance of said conspiracy and in order to accomplish its objectives, the defendants committed the following overt acts, among others in the Southern District of New York and elsewhere:

1. On or about March 20, 1976 the defendant ROBERT MICHAELSON travelled to the Pepper Tree Restaurant, Mt. Kisco, New York in order to meet and negotiate with prospective buyers of weapons, munitions and other implements of war.
2. On or about March 21, 1976 the defendant RAYMOND GERALDO travelled to the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning the sale of certain weapons, munitions and other implements of war.
3. On or about March 22, 1976, the defendants DOMINICK CAGIANESE and RAYMOND GERALDO met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning arrangements



to obtain from an official of a foreign government false and fraudulent documents to be filed with the United States Department of State.

4. On or about March 27, 1976, March 29, 1976 and April 14, 1976, at the Pepper Tree Restaurant, Mt. Kisco, New York the defendants DOMINICK CAGIANESE, FRANK G. ALVAREZ, RAYMOND GERALDO and ROBERT MICHAELSON had conversations concerning an initial sale of 10,000 submachine guns for a price of \$2,800,000.

5. On or about April 1, 1976, the defendant DOMINICK CAGIANESE travelled to the vicinity of Winston-Salem, North Carolina in order to observe and participate in a test firing demonstration of a "Bushmaster" submachine gun.

6. In or about April 1976, the defendant RAYMOND GERALDO travelled to Central America for the purpose of obtaining a false and fraudulent certificate from an official of a Central American country.

7. On or about May 2, 1976, the defendants RAYMOND GERALDO, ROBERT MICHAELSON, DOMINICK CAGIANESE and MIGUEL D. CELIS met at the Pepper Tree Restaurant, Mt. Kisco, New York and had a conversation concerning a cash payment to be made to the defendant MANUEL ALFONSO RODRIGUEZ in return for the defendant RODRIGUEZ facilitating the filing of false and fraudulent documents with the United States Department of State.

8. On or about May 3, 1976 the defendants FRANK G. ALVAREZ, MIGUEL D. CELIS and RAYMOND GERALDO met at the offices of Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New



York, and had a further conversation concerning arrangements to file certain false and fraudulent documents with the United States Department of State.

10. On or about May 5, 1976 the defendant FRANK G. ALVAREZ directed one of his employees to deliver certain false and fraudulent documents to the United States Department of State, Washington, D.C.

11. On or about May 14, 1976 the defendant FRANK G. ALVAREZ placed a telephone call from the offices of Mott Haven Industries, Ltd. to El Salvador, Central America.

12. On or about May 14, 1976 the defendant FRANK G. ALVAREZ placed a telephone call from the offices of Mott Haven Industries, Ltd., to the United States Department of State, Washington, D.C.

13. On or about May 15, 1976, the defendants MANUEL ALFONSO RODRIGUEZ, MIGUEL D. CELIS, RAYMOND GERALDO, IRWIN TOBOCMAN, ROBERT MICHAELSON and FRANK G. ALVAREZ met at the Holiday Inn, Mt. Kisco, New York and discussed their plan to sell weapons, munitions and other implements of war to buyers in the United States.

14. On or about May 15, 1976, at the Holiday Inn, Mt. Kisco, New York, the defendants MANUEL ALFONSO RODRIGUEZ and MIGUEL D. CELIS received the approximate sum of \$75,000 in cash for having provided, and having agreed to provide certain false and fraudulent documents filed and to be filed with the United States Department of State.

15. On or about May 15, 1976 at the Holiday Inn, Mt. Kisco, New York, the defendants ROBERT MICHAELSON and IRWIN



TOBOCMAN received the approximate sum of \$25,000 in cash for having facilitated the preparation of false and fraudulent documents filed and to be filed with the United States Department of State.

(Title 18, United States Code, Section 371).

COUNT TWO

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOCMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a United States Department of State Form DSP-5, entitled "Application/License for Permanent Export of Unclassified Implements of War...." that 10,000 "Bushmaster" submachine guns having an approximate value of \$2,550,000 together with 1.5 million rounds of ammunition for the said submachine guns were to be exported to the nation of El Salvador, Central America for use in El Salvador's national defense, whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns were to be sold to individuals in the United States at a price of approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same



individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about May 5, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOCMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a certificate dated April 22, 1976 on the official letterhead of the "Estado Mayor General De La Fuerza Armada, San Salvador, El Salvador, C. A.", bearing the signature of the defendant Manuel Alfonso Rodriguez, that 10,000 "Bushmaster" submachine guns and 1.5 million rounds of ammunition for said submachine guns were to be used by the armed forces of El Salvador and would not be re-exported to any third party whereas, in truth and in fact, the defendants then and there well knew that the said 10,000 "Bushmaster" submachine guns and the 1.5 million rounds of ammunition were to be sold to individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)



COUNT FOUR

The Grand Jury further charges:

On or about May 3, 1976, in the Southern District of New York and elsewhere, DOMINICK CAGIANESE, FRANK G. ALVAREZ, IRWIN TOBOCMAN, ROBERT MICHAELSON, RAYMOND GERALDO, MIGUEL D. CELIS, and MANUEL ALFONSO RODRIGUEZ, the defendants, in a matter within the jurisdiction of a department or agency of the United States, to wit, the United States Department of State, unlawfully, wilfully and knowingly did make, facilitate the making of, and cause to be made certain false, fictitious and fraudulent statements and representations on a purchase order, dated May 3, 1976, from San Pan Trading Corporation, 3 Wren Drive, Woodbury, New York to Mott Haven Industries, Ltd., 429 Bruckner Blvd., Bronx, New York, that 10,000 machine guns at a price of \$245 each together with 1.5 million rounds of ammunition were to be exported to El Salvador, Central America, whereas, in truth and in fact, the defendants then and there well knew that the 10,000 machine guns were to be sold to individuals in the United States for approximately \$2,800,000 and further that the 1.5 million rounds of ammunition were to be sold to the same individuals in the United States.

(Title 18, United States Code, Sections 1001 and 2.)

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FOREMAN

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ROBERT B. FISKE, JR.  
UNITED STATES ATTORNEY



A-13

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PROPOSED VOIP DIRE



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA :  
 :  
 - against - :  
 :  
 ROBERT MICHAELSON, :  
 :  
 Defendant. :  
-----X

PROPOSED VOIR DIRE

1. In view of the fact that some of the defendants are involved in international trade as business men, would you hold them to any higher standards than other types of businessmen?

2. Do you find that salesmen tend to be more untruthful than people in other endeavors?

3. Do you have any prejudices against businessmen who act as brokers or finders or deal makers -- would you have any special feelings towards any of the defendants if you found that they were in the business of making deals?

4. Where a defendant pleads entrapment and indicates that Government agents, by threats and harassment and persuasion induced him to commit a crime, would you automatically convict him -- even though he has admitted to committing a crime, but under pressure of Government officials? In other words, if I



charge you at a later date that entrapment is a valid defense and that if you find a man was entrapped into committing a crime by Government agents, that you could acquit him, would you go against my charge?

5. You are aware that you are the finders of the fact and I will tell you what the law is -- would you have any problem in accepting the law as I give it to you?

6. If I charge you the elements of entrapment and you find that the defendant's conduct fits under the elements of entrapment, would you have any hesitancy acquitting the defendant, even though you know he committed acts that are criminal?

7. A defense of coercion or entrapment is an affirmative defense that may be available to a defendant in this case. If I were to charge you that entrapment viciates guilt and that if you found that the defendant was either entrapped or coerced by Government agents to commit a crime would you have any problems acquitting him?

8. Do you understand or would you have any problems with the fact that at times people do things under duress so as not to make them liable for criminal acts. In other words, criminal intent may be eliminated by threats, enticements, harassments or even mere persuasion by Government agents which induce the defendant to commit a crime -- if I charged you with regard to entrapment or coercion with that context, would you follow my charge?



- 3 -

9. A juror must promise that he will accept the law from the judge as I am not permitted nor will I determine what the facts of this case are. You cannot determine what the law is and must accept what I tell you. If I charge you what the law is and you don't agree with what I tell you, will you have any problems in accepting that as the law?

Dated: New York, New York  
September 20, 1976

Respectfully submitted,

---

BARRY IVAN SLOTNICK



PLEA OF GUILTY -SEPTEMBER 22, 1976



1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 UNITED STATES OF AMERICA, :

5 vs. : 76 Cr. 503

6 MANU FONSECA RODRIGUEZ, et al., :

7 Defendants. :

8 -----x

9 New York, New York  
10 September 22, 1976

11  
12 BEFORE: HON. KEVIN T. DUFFY,

13 District Judge

14  
15 APPEARANCES:

16 ROBERT B. FISKE, JR., ESQ.,  
17 United States Attorney for the  
18 Southern District Of New York  
19 BY: JAMES MOSS, ESQ.,  
20 Assistant United States Attorney

21  
22 BARRY IVAN SLOTNICK, ESQ.,  
23 Attorney for Defendant Robert Michazlson  
24  
25



1 lhl t

2 (In the robing room.)

3 MR. SLOTNICK: Your Honor, most respectfully  
4 at this time the defendant Robert Michaelson desires to with-  
5 draw the plea of not guilty to indictment number 76 Cr. 503  
6 and enter a plea of guilty to the Fourth Count of the indict-  
7 ment, to wit, that he aided and abetted pursuant to Section  
8 18, United States Code 1001, in making out a false purchase  
9 order, knowing that it would be filed with the State Depart-  
10 ment. To cover this indictment and whatever other investiga-  
11 tions Mr. Fiske might have --

12 THE COURT: Wait.

13 MR. SLOTNICK: To cover this indictment.

14 THE COURT: I cannot accept a plea of guilty  
15 unless I am convinced that it is being made voluntarily,  
16 that you are knowledgeable, that you know your rights, that  
17 you know the consequences of your plea and that it is not  
18 induced by anything except the fact that you might be guilty.

19 Do you understand that, sir?

20 DEFENDANT MICHAELSON: Yes.

21 THE COURT: Do you realize that if you persisted  
22 in your plea of not guilty, you would be entitled and would  
23 have a trial before either myself or a jury and myself, and  
24 that at that trial you would be presumed to be innocent until  
25 such time as the government produced such facts to prove you



1     lhl t

2     guilty beyond a reasonable doubt?

3             DEFENDANT MICHAELSON: Yes, sir.

4             THE COURT: How old are you?

5             DEFENDANT MICHAELSON: 46.

6             THE COURT: You know you have a right through  
7 your counsel, who is one of the more able attorneys that I  
8 have seen come into court in about four years, to cross  
9 examine the witnesses against you, and that if need be, I  
10 would issue orders to get people in here to testify for you,  
11 you know that, do you?

12            DEFENDANT MICHAELSON: Now I know it, sir.

13            THE COURT: Do you wish me to read the fourth  
14 count of the indictment?

15            DEFENDANT MICHAELSON: I think I understand it.

16            MR. SLOTNICK: We have discussed the fourth  
17 count.

18            Mr. Michaelson has read it, your Honor. Is there  
19 any question in terms of your understanding the wording? It  
20 is not a formality that the Judge has to do, if that is what  
21 you are concerned about.

22            THE COURT: Do you understand it?

23            DEFENDANT MICHAELSON: I think I understand it.

24            Yes, I think so.

25            THE COURT: As to the fourth count of the indictment, how do you plead, guilty or not guilty?



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2

DEFENDANT MICHAELSON: Guilty, sir.

3

4

THE COURT: Did anyone make any threats or promises to you in connection with this --

5

DEFENDANT MICHAELSON: At the time that I --

6

7

THE COURT: No, no, now, in connection with the plea.

8

DEFENDANT MICHAELSON: No, sir.

9

10

THE COURT: Do you realize that it is possible for me to sentence you up to five years in prison on this count and fine you up to \$10,000?

11

12

DEFENDANT MICHAELSON: Yes, sir.

13

14

THE COURT: Did anyone even make any predictions as to what kind of a sentence I might impose?

15

DEFENDANT MICHAELSON: No, sir.

16

THE COURT: Have you ever been in trouble before?

17

DEFENDANT MICHAELSON: Never in my life, sir.

18

19

THE COURT: Are you presently under the care of a physician or a psychiatrist?

20

DEFENDANT MICHAELSON: No, sir.

21

THE COURT: Or take any kind of drugs, or anything

22

like that?

23

DEFENDANT MICHAELSON: No, sir.

24

THE COURT: Tell me what went on with this.

25

DEFENDANT MICHAELSON: Generally, sir?



1 1hlt

5

2 THE COURT: Yes.

3 DEFENDANT MICHAELSON: I was induced to attend  
4 that first meeting.

5 THE COURT: And you did?

6 DEFENDANT MICHAELSON: And I did, yes. I attended  
7 the first meeting, I was then induced to attend a second  
8 meeting.

9 THE COURT: Yes, I want to hear exactly what went  
10 on.

11 DEFENDANT MICHAELSON: Then induced to go to a  
12 second meeting. I attended the second meeting.

13 After the second meeting, I felt I was -- I don't  
14 want to use the word "entrapped," I just felt I was in this  
15 thing, I couldn't get out of it anymore. I was never in trouble  
16 in my life.

17 THE COURT: What kind of work did you do?

18 DEFENDANT MICHAELSON: My company is a brokerage  
19 company.

20 THE COURT: What kind of work did you do?

21 DEFENDANT MICHAELSON: I was the head of the  
22 particular company, looking for products, marketing out products,  
23 both non-foods and food, for our own companies and for allied  
24 companies, and that's been my life pretty much.

25 THE COURT: Did you know that somebody was going



1 lht

2 to file a statement in connection with the guns involved?

3 DEFENDANT MICHAELSON: There were discussions at  
4 the meetings, sir, yes, that there had to be a purchase order  
5 filed.

6 THE COURT: You know about it at the time?

7 DEFENDANT MICHAELSON: When the purchase order  
8 was filed, I knew about it, yes, sir.

9 THE COURT: Mr. Slotnick, do you know of any reason  
10 why I should not accept the plea of guilty in this case?

11 MR. SLOTNICK: No. I have evaluated the case, your  
12 Honor, and I think it is in the best interest of the defendant  
13 to take the plea. I know of no reason.

14 THE COURT: Mr. Fiske, do you know of any reason  
15 why I should not accept the plea of guilty in this case?

16 MR. FISKE: No, I do not.

17 THE COURT: I believe the plea is being entered  
18 knowledgeably and voluntarily and has a basis in fact.

19 Under the circumstances, the plea of guilty will  
20 be accepted.

21 MR. FISKE: We would agree to go from the hall,  
22 your Honor.

23 THE COURT: So would I.

24 MR. SLOTNICK: I would ask that the defendant,  
25 in view of the fact that his livelihood is dependent on his



1 1hlt

2 ability to travel, be allowed to travel through the continental  
3 United States, and, if he desires, to travel out. I would make  
4 that application to your Honor.

5 THE COURT: I don't know if he is going to  
6 travel outside the United States, I prefer that you make a  
7 specific application as to where he goes.

8 MR. SLOTNICK: I will, of course, your Honor.

9 DEFENDANT MICHAELSON: May I make one statement?

10 I don't know if it is -- at the time of the  
11 purchase order, I was afraid, sir, not to sign it, but I knew  
12 I could have gone to the authorities. I acted stupidly. I  
13 should have gone to the authorities.

14 THE COURT: Okay. You have to go now to the  
15 Probation Department.

16 Mr. Slotnick will take you down there and show  
17 you where it is and make an appointment for you. Do yourself  
18 a favor:

19 Be honest with these folks. Do you know about  
20 my rules on presentences reports?

21 MR. SLOTNICK: No, I do not, your Honor, except  
22 I know your Honor gives full disclosure.

23 THE COURT: Absolutely. The day before sentence  
24 or two days before sentence, I want you to come up and read  
25 the entire thing, and I do not want you to make a copy of it--



1 lhl t

2 MR. SLOTNICK: I can make a copy?

3 THE COURT: No.

4 MR. SLOTNICK: I know, the Probation Department  
5 wouldn't allow me to do it anyhow.

6 THE COURT: I don't care what they say. However,  
7 if you should find that there is something that you disagree  
8 with, I want you to make it known to me, and if you need  
9 time to investigate it thereafter, I will give it to you.

10 MR. SLOTNICK: It is my intention, your Honor, to  
11 submit alongside of the Probation--

12 THE COURT: By the way, you also wanted certain  
13 tape recordings, you wanted me to listen to them, is that  
14 correct?

15 MR. SLOTNICK: That's correct, your Honor. What  
16 I will be doing is I will be submitting a presentence --

17 THE COURT: Do you have copies?

18 MR. SLOTNICK: I have copies of everything.

19 THE COURT: Do you have copies of the tape  
20 recordings? Apparently you indicated yesterday that you felt  
21 I should hear the tone of voice used and so on and so forth.

22 MR. FISKE: Your Honor, we have all the tapes.  
23 Whichever ones Mr. Slotnick wants you to hear, if he will tell  
24 us, we will make them available to you.

25 THE COURT: I will listen to them.



1 lhlit

2 MR. SLOTNICK: I have them in my office.

3 I would suggest, your Honor, that in all probability  
4 during the course of the trial your Honor would be getting  
5 the idea of what I intend to present in my presentence memo-  
6 randum. If it is necessary for your Honor to listen to tape  
7 recordings, although I presume Mr. Fiske will be playing them  
8 to the jury, you will hear them anyhow.

9 Nevertheless, we will submit extensive presentence  
10 memoranda because of my feelings of Mr. Michaelson's status  
11 in this case.

12 THE COURT: Counselor, I don't need to say it,  
13 but I am going to say it anyway:

14 I only say it because you hopefully will under-  
15 stand how deeply I am concerned with the entire problem of  
16 sentence. In submitting a presentence memorandum, you are not  
17 only an advocate, but you are an officer of the Court.

18 MR. SLOTNICK: At all times, your Honor.

19 THE COURT: I am kind of sorry that you won't  
20 be around for this trial.

21 MR. SLOTNICK: Can we go off the record?

22 (Discussion off the record.)

23 THE COURT: Are you agreeable to having this held  
24 in the robing room rather than in open court?

25 MR. SLOTNICK: Absolutely, your Honor. The



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proceeding just now?

THE COURT: Yes.

MR. SLOTNICK: It was at my application to the Court that it be held in the robing room.

THE COURT: Your client has to say it.

MR. SLOTNICK: Bob, you have a choice. You can have your plea of guilty taken in the entire public courtroom or in the robing room as we have just done now.



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LETTER REQUESTING A CONTINUANCE - NOVEMBER 18, 1976



November 18, 1976

Hon. Kevin T. Duffy  
United States District Judge  
United States Courthouse  
Southern District of New York  
Room 1601  
Foley Square  
New York, New York 10007

DELIVERED BY HAND

RE: United States v. Michaelson, et. al.  
76 CR 503

Honorable Sir:

As you are no doubt aware, my client, Robert Michaelson, is scheduled to be sentenced in the above-captioned matter on Monday, November 22. As a result of the reading of the pre-sentence report on November 16, 1976, I must beg the Court's indulgence and request that a continuance be granted so that I am able to present the complete set of issues to Your Honor in a proper and orderly fashion.

This request is made neither of dilatoriness nor frivolity, but rather out of necessity. I have just yesterday received some 300 pages of extremely volatile material which must now be digested and analyzed in the light of the recently-made-available probation report. There is other evidence that, while present in the case, was never brought to the Court's attention through trial.

*Inter alia*, there remain extant legal matters which demand greater attention than the present scheduling period permits. To properly bring these issues to the Court's attention requires a sentencing memorandum far too complex to be completed on or before November 22, 1976.



It is, therefore, with full realization of my responsibility as an officer of the Court, that I must ask that this matter be put over and otherwise postponed until December 15th of this year.

I most respectfully wish to assure the Court that our request for an adjournment is being done pursuant to the reasoning set forth by the United States Court of Appeals in its recent decision of United States v. Robin, F.2d (2d Cir., 1976) (Slip Op No. 951, October 15, 1976), and in the interests of justice?

Thanking the Court for its time and consideration, I remain,

With all respect,

BIS/jo

BARRY IVAN SLOTNICK  
Attorney for Robert Michaelson

cc: Hon. Robert B. Fiske, Jr.  
United States Attorney  
Southern District of New York  
1 St. Andrew's Plaza  
New York, New York 10007

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\* We have this date contacted the attorneys for Geraldo, Toboocman, Cagianese and Alvarez who have indicated that they do not object either to our matter being adjourned or the complete matter being adjourned -- subject to their clients' approval.

\*\* As a result of the material presented in the pre-sentence report, it is essential that Michaelson have the requested period of time to submit further papers and documentation in order to indicate to the Court the equities of his position -- both morally and legal. As a result of the pre-sentence report, the defendant Michaelson has voluminous material to present to the Court which might culminate in a hearing as to the facts and circumstances surrounding this entire matter.

On November 17, 1976, I called the office of Robert Fiske and indicated to Mr. Fiske that I would be making the request for a continuance and asked for his consent. Mr. Fiske indicated that he would be calling me back on this date. However, at the time of typing we have not received his call. Upon calling Mr. Fiske's office we have been informed that he is presently in Washington, D.C.



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MOTION TO WITHDRAW GUILTY PLEA - NOVEMBER 19, 1976



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

- against - :

ROBERT MICHAELSON, :

Defendant. :

-----X

NOTICE OF MOTION

76 CR 503

(KTD)

S I R S :

PLEASE TAKE NOTICE that upon the annexed duly sworn affidavits of BARRY IVAN SLOTNICK, ESQ., and ROBERT MICHAELSON, and upon the indictment herein, and upon all of the papers and proceedings had herein, the undersigned will move this Court on the 22nd day of November, 1976, before the Honorable Kevin T. Duffy at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order, pursuant to Rule 32 (d) of the Federal Rules of Criminal Procedure, permitting the above-named defendant, ROBERT MICHAELSON, to withdraw his plea of guilty heretofore interposed and to enter a plea of not guilty to the indictment herein and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
November 19, 1976

Yours, etc.

BARRY IVAN SLOTNICK  
Attorney for defendant  
233 Broadway  
New York, New York 10007  
(212) 964-3200



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A-33

-----X  
UNITED STATES OF AMERICA, :

- against - :

ROBERT MICHAELSON, :

Defendant. :

AFFIDAVIT

76 CR 503

(KTD)

-----X  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss:  
SOUTHERN DISTRICT OF NEW YORK)

ROBERT MICHAELSON, being duly sworn, deposes and says:

1. That I am the defendant in the above-captioned case.

2. I make this affidavit in support of the motion to withdraw my plea of guilty and interpose a plea of not guilty to the indictment herein.

3. I plead guilty on September 22, 1976, to Count Four of the indictment, to wit, aiding and abetting the making of a fraudulent statement.

4. I have always maintained I was acting under fear. This fear was instilled in me by Government Agents who were posing as underworld hoodlums and caused my total involvement.

5. The reason I plead guilty was because in analyzing the evidence then available to me, I realized that it would minimize my risks pursuant to a plea bargain struck by my attorney.



6. At the time of plea negotiations, which were going on up to the morning of trial, the Government agreed it would take no stand or position with regard to my sentencing and it would not go beyond relating what had occurred in point of facts.

7. It is my belief, after being advised by counsel, that the United States Government has violated our agreement, in that they have not only taken a position prior to my sentencing, but that they have characterized me as the most culpable of the defendants; the "supervisor" of my alleged co-conspirators, and the "link" between my alleged co-conspirators and the fictitious "underworld buyers". My attorney has informed me that these statements appear in the Pre-Sentencing Report now before the Court and they are directly attributed to Assistant United States Attorneys. Not only are these statements incorrect, but they are so placed as to cause the Court to look at me as the main culprit, which I am not.

8. Further, evidence which I have just seen in my attorney's office indicates to me that my initial feeling that I was duped and tricked into my involvement in these matters may now be successfully proven.

9. I state clearly and without equivocation that I entered this scenario under fear, and that it was this fear for the lives of myself and my loved ones which kept me in the alleged conspiracy. This is what I stated to the Court at the time I took the plea -- and I reaffirm it now.



10. Had the promise of the United States Attorney not been made to me at the time I took the plea, I would have had my trial and been able to present my side of the story.

11. Two matters are presented to the Court herein:

A) My plea was predicated upon a plea negotiation that the Government would only factually relate what took place during the period of time covered by the indictment. By analyzing and making value judgements, the Government has breached its agreement with the purposeful intent of hurting me before the Judge.

B) I have indicated to my attorney, the Court and the Government that I acted under fear instilled into me by Mr. Stagg, who I have discovered was a real life gangster working with the Government. This fact was hidden from me prior to my plea -- even though it was very favorable and germane to my defense. Indeed, when I pled I indicated that I was acting in fear even though I realized I could go to the authorities for protection. In truth and fact, I knew I could go to the authorities but I feared that they could not protect my wife and family.

I was not the most culpable -- I was scared to death by the "little theatre group". The most culpable were the people who put me in the position I was in -- Stagg and company. The

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\* This allegation is as a result of the attitude displayed towards me by the Assistant United States Attorney - even while I was cooperating and prepared to testify.



tapes clearly show that I tried to back out of this deal\*. Not only was I not culpable but I was only continuing in this scheme because I was told that my family was in danger. The trial left much to be desired as the full facts concerning my role did not come out.

The tapes show my desire to be removed and back out of this deal. I was not allowed to walk out.

In fact, the original list of arms was taken off my desk and eventually transmitted to the Government Agents. At that point, I was not involved in guns or weapons. Only after I was coerced into attending a meeting with Stagg did I know I had a problem. I believed I was entrusted with one of the deepest secrets of the underworld. I could only hope that in time I would be released from my newly attached "friends".

12. The Government is well aware of the facts that mitigate against my culpability. They know:

(a) I was not involved in the original Arms Deal in that I never was into the meetings. I never met the people from Mott Haven before April.

(b) Cellis and Colonel Rodriguez were not my connection.

(c) Geraldo was not my employee.

(d) Apparently people around me were heavily involved in arms deals - without my knowledge - I am still not sure if this is true.

---

\* I never sold guns in my life.



13. I felt that in attempting to minimize my risks, the Court would, before sentence, know all the facts.

I thought I would be called as a witness and that the Court would see all the "players" in this horror show. However, none of this was presented to the Court.\*

14. For some reason not fully known to me the Assistant United States Attorneys have seen fit to lower the boom on me and have presented the Court material which not only is in violation of my agreement with the United States Attorney - but also material that is incorrect.\*\*

15. I feel as if I have been labeled an arch-criminal - a fact that is not only untrue but also "unfair" and in violation of my plea arrangement.

16. I again ask Your Honor for time to explain my actual position. I tried at my plea when I told the Court I acted under fear. I tried when I explained it to the United States Attorney. I tried when I explained it to the probation officer.

17. I reaffirm that I have been a victim rather than a culprit. I am constrained to ask for my day in Court - so that the Court will understand my fear and not destroy me because of an incorrect value Judgment. I WAS NOT THE CULPRIT WHO WAS MOST CULPABLE. I was acting under a fear of my life and that of my family.

The references to me by those who may not have liked my

---

\* The tapes with a full explanation would show my entrapment.

\*\* The probation report was seen by my attorney on November 16, 1976. On November 18, 1976, the Court denied my request for a postponement so that I could present fuller.



deal should not be allowed to destroy me -- in breach of my plea agreement.

Especially since I acted under the compulsion of fear.  
The tapes of March 20th clearly show that

- 1) I did not know what I was talking about.
- 2) I was dragged into this mess and motivated by fear.
- 3) I was threatened in a subtle way.

Stagg indicates he is a famous gangster and intimates that people "could spend the rest of their life in the desert".

18. The Government should know that I was a scared GO-FER and not an organizer or supervisor. In fact, the tapes relate that Stagg is not sure whether I'm in the deal or not.

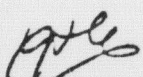
19. I respectfully request that my plea be withdrawn so that I may procede to trial in view of the fact that:


- a) My plea bargain agreement was breached and
- b) I was actually in fear and entrapped as I told this Court on the day of my plea.

WHEREFORE, I respectfully request that the relief sought herein be granted in all respects.

  
ROBERT MICHAELSON

Sworn to before me this

 day of November,  
1976

  
NOTARY PUBLIC  
NOTARY 445811C  
Commission Expires March 30, 1977



UNITED STATES OF AMERICA,

- against -

ROBERT MICHAELSON,

Defendant.

:

•

AFFIDAVIT

76 CR 503

(KTD)

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss:  
SOUTHERN DISTRICT OF NEW YORK)

BARRY IVAN SLOTNICK, being duly sworn, and upon information and belief, deposes and says.

1. That I am attorney duly admitted to practice before the Courts of this State and this District.

2. That I represent the defendant ROBERT MICHAELSON in the above-entitled action and that I am making this affidavit in support of a motion under FRCr.P Rule 32(d) to allow the defendant to withdraw his plea of guilty and allow the interposition of a plea of not guilty in its stead.

2. On September 22nd, 1976, defendant entered a plea of guilty to a charge of aiding and abetting the making of a false statement.

3. This plea must be vacated due to the fact that the defendant relates an insufficient factual basis for its taking. At the time of the allocution, defendant alleges he clearly told the Court that his acts were the product of fear and duress, and, as such, defendant did not possess the adequate mens rea for the



crime charged. F.R.Cr.P Rule 11 [Minutes of plea ordered].

4. Further, the plea must be vacated due to the breach of agreement by the United States Attorney. When the plea was taken, the government assured the defendant's counsel that it would take no position with reference to sentencing, but would only lay out the facts of the events. In contravention of this, the Government outlined via the Pre-Sentencing Report, their belief that defendant was the most culpable of the seven defendants. The Government terms him the supervisor of two of the co-defendants, and the link between others and the bogus underworld figures in the scheme.

5. Further, this Court has not allowed defendant adequate time to counter this unexpected attack in the Pre-Sentencing Report (available to counsel only 3 1/2 business days before sentencing). United States v. Robin, F.2d (2d Cir., 1976) (Slip Op No. 951, 10/15/76) citing, inter alia, United States v. Rosner, 485 F.2d 1213 (2d Cir., 1973).

6. In addition, the Government has failed to present all arguably exculpatory material to the defendant, in direct violation of the protections afforded by Brady v. Maryland and Giles v. Maryland, and therefore the plea may not be said to be voluntary in the sense of "knowing and voluntary".


7. The entire set of circumstances would combine to deprive defendant of his liberty without Due Process of law, counter to the applicable provisions of the United States Consti-



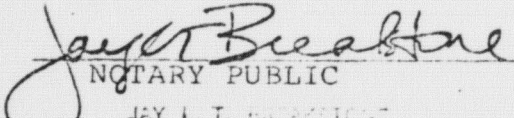
tution.

WHEREFORE, I respectfully request that the relief sought herein should be in all respects granted.

Dated: New York, New York  
November 19, 1976

  
BARRY IVAN SLOTNICK  
Attorney for Defendant  
233 Broadway  
New York, New York 10007  
(212) 964-3200

Sworn to before me this  
day of November,  
1976

  
NOTARY PUBLIC  
JAY L. T. BREDSTONE  
Notary Public State of New York  
No. 4625583  
Qualified in New York County  
Commission Expires March 30, 1977



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

- against -

76 CR 503  
(KTD)

ROBERT MICHAELSON,

Defendant.

-----X

MEMORANDUM OF LAW

BARRY IVAN SLOTNICK  
Attorney for Defendant  
233 Broadway  
New York, New York 10007  
(212) 964-3200



INTRODUCTION

This Memorandum is presented on the behalf of the defendant to aid and assist the Court in its decision upon the defendant's Motion to withdraw his plea of guilty. It is hoped that the discussion herein will serve to focus the eyes of the Court upon the salient factors to be considered in deciding such a Motion.

UNDER ALL THE PERTINENT STATUTES  
AND CASE LAW THERE EXISTS NO  
REASON WHY THE DEFENDANT'S  
MOTION SHOULD NOT BE GRANTED

The withdrawal of a defendant's plea of guilty is covered by Rule 32 of the Federal Rules of Criminal Procedure ("Rule 32"). More specifically, the Rule, entitled "Sentence and Judgement", concerns itself with withdrawal in §(d). Rule 32(d) states as follows:

"(d) WITHDRAWAL OF PLEA OF GUILTY. A Motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgement of conviction and permit the defendant to withdraw his plea."

Though no specific standards are set to guide the Court in deciding the motion for withdrawal of a plea of guilty, Federal Courts have favored a withdrawal prior to sentencing, "if for any reason the granting of the privilege seems fair and just." Kercheval v. United States, 274 U.S. 220, 224, 71 L.Ed. 1009, 47 S.Ct. 582 (1927); see also, 2 Cipes §45.03 at 45-11. Because



of the absence of standards, the motion to withdraw a plea of guilty prior to sentence has been read as requiring a less exacting standard than the "manifest injustice" required for that same withdrawal subsequent to sentencing. Most writers agree that withdrawal should be liberally granted on such a set of facts. 8A Moore's Federal Practice ¶32.07 [2].

While there is no absolute right to the withdrawal of a plea of guilty, it is to be considered a matter of discretion and, therefore, the Court is required to examine the totality of the circumstances to prevent injustices and unfairness. United States v. Lombardozzi, 436 F. 2d 878 (2d Cir.) cert. den. 402 U.S. 908 (1971), Cf. Dukes v. Warren, 406 U.S. 250,259 (1972) [Mr. Justice Marshall dissenting, urging permissive withdrawal before sentencing upon continued protestation of innocence.]

The American Bar Association, Standards Relating to Plea of Guilty, discusses the withdrawal of a plea of guilty at §2.1. To paraphrase those standards, for the benefit of brevity, the Standards indicate that the Court should allow the withdrawal of a plea of guilty if said motion is a timely one and whenever defendant proves that withdrawal is necessary to prevent a manifest injustice. [Standards §2.1(a)]. §2.1(a)(i) defines the word "timely" as being when the motion for withdrawal is made with due diligence, and further that the timeliness of such a motion is not barred by reason of fact as is made after



sentencing. §2.1(a)(ii) describes the phrase "necessary to correct manifest injustice" as referring to situations when, inter alia, a plea is not entered voluntarily [§2.1(a)(ii)(3)] or the defendant did not receive the concessions contemplated by a plea agreement where the prosecutor has failed not to oppose the concessions as promised. [§2.1(a)(ii)(4)].

The Standards go on to say that a defendant need not allege his innocence in order to withdraw his plea of guilty [§2.1(a)(iii)]. Though this, undoubtedly, must be a factor in the Court's determination. Finally, the Standards underscore the precedents in this area by indicating the following:

"Before sentence the court in its discretion may allow the defendant to withdraw his plea for *any fair and just reason* unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." Standards §2.1(b).

One can readily see that the burdens on the defendant upon his motion to withdraw a plea before sentencing are not great.

"Before sentencing, the inconvenience to Court and prosecution is ordinarily slight as compared with the public interest and protecting the right of the accused's trial by jury." Cadwell v. United States, 315 F.2d 667, 670 (9th Cir., 1963.)

Rule 32(d) is to be read by the Court as a "safeguard against the consequences of an improvident plea of guilty".

5 Orfield: Criminal Procedure Under the Federal Rules, §32:41.

In summary, it can be seen that when weighing motions for withdrawal of a guilty plea prior to sentencing, the Court is to apply the standard of fairness and justice. e.g.



United States v. Stayton, 408 F.2d 559 (3rd Cir., 1969).

The "manifest injustice" guideline plays no part in the decision where the withdrawal of plea is sought to be taken before sentencing. e.g. Oksanen v. United States, 362 F. 2d 74 (8th Cir., 1966).

AN ANALYSIS OF THE FACTORS IN  
THIS CASE WILL SHOW THAT ALL  
OF THESE FACTORS DICTATE THE  
GRANTING OF DEFENDANT'S MOTION

The decision to allow withdrawal of the guilty plea is one that must be made after examining many factors including the voluntariness of the plea. This may only be determined by weighing all of the relevant circumstances extant in the case. United States v. Lombardozzi, 436 F.2d 878 (2d Cir., 1971) cert den 402 U.S. 908, 28 F.2d 648, 91 S.Ct. 1379.

Not the least of the situations in which a plea of guilty should be permitted to be withdrawn is where the prosecution has breached an agreement upon which the defendant relied in accepting a proffered guilty plea situation. See A.B.A. Standards, Pleas of Guilty, §2.1 (a)(4)(5). In Santobello v. New York [404 U.S. 257, 30 L.Ed. 2d 427, 92 S.Ct. 495 (1971)] the Supreme Court faced such a violated bargain, i.e. the promise to abstain from making a recommendation at the time of sentencing. The decision is read by most courts to hold for the principal that a defendant pleading guilty is entitled to the terms of that bargain and that the prosecutor is bound to the agreement he made.



Much litigation has revolved around F.R.CrP. Rule 11 and the procedures under which a factual basis for the taking of a plea of guilty must be present. At the head winds of these opinions lies the case of Boykin v. Alabama, [395 U.S. 238, 23 L.Ed. 2d.274, 89 S.Ct. 1709 (1969)]. The Supreme Court there dealt with the nature of the taking of a plea, and most specifically with the issue of voluntariness, realizing that the guilty plea involves a waiver of at least three Constitutional rights and that the mere inferences from the taking of a plea will not be sufficient to show a waiver of those rights. Voluntariness is a complicated issue and clearly many matters mitigate against its presence. Not the least of these is the failure to disclose material facts. Even though voluntariness appears from the record and on its face remains correct, there is always the possibility of coercion by the prosecution via the instrument of withholding material facts thereby misleading defendant's counsel and, of course, the Court. See Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed. 2d. 473 (1972) [In Machibroda, the Supreme Court ordered a hearing where the allegations at issue related to occurrences outside the record.]

The undermining of voluntariness by coercion may also be accomplished through the instrumentality of the Court, for example where the Court convinces the defendant, or intimates to the fact that should the defendant proceed with trial, he will be dealt with more harshly than if a plea was taken. See United States v. Tateo, 214 F. Sup. 560 (SDNY, 1963). No doubt the same end, if desired,



may be achieved by the prosecutor. See Machibrodó v. United States, supra.

Lastly, in this survey, we deal with the situation of where the Court, upon review, is found to have lacked a factual basis for the taking of a plea. Such is required by the federal rules and suggested by the A.B.A. Standards, §1.6. This may arise in many situations with the clearest being where the defendant continues to protest his innocence. Perhaps more frequent is the situation where the defendant is found, through allocution, not to have possessed the necessary intent to make out the offense charged or to have possessed a valid defense to the charge. See Cipes, supra, at §45.03[6] and cases cited therein.

#### SUMMARY

Perhaps the best summary of the law relating to the withdrawal of pleas of guilty was that of the Honorable Walter V. Schaefer, sitting on the Appellate Bench of the State of Illinois. Judge Schaefer was chairman of the A.B.A.'s advisory committee which drafted the Guilty-Plea Standards. His statement follows:

"The discretion of the trial court to permit the withdrawal of the plea of guilty is a judicial discretion which should always be exercised in favor of innocence and liberty. The law favors a trial upon the merits by jury, and all courts should so administer the law and construe the rules of practice as to secure a hearing upon the merits, if possible. *The least surprise or influence causing the defendant to plead guilty when he had any defense at all should be suffi-*



A-49

*cient cause to permit a change of the plea from guilty to not guilty. And withdrawal of the plea of guilty should not be denied in any case where it is evident that the ends of justice will be served by permitting the plea of not guilty in its stead." People v. Riebe, 40 Ill. 2d. 565, 24 N.E. 2d 313 (1968) [Emphasis supplied].*

CONCLUSION

The motion of the defendant for an order permitting him to withdraw his plea of guilty and in its stead interpose a plea of not guilty should be allowed.

Respectfully submitted,

BARRY IVAN SLOTNICK  
Attorney for defendant  
233 Broadway  
New York, New York 10007  
(212) 964-3200



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, :

-v- :

AFFIDAVIT

DOMINICK CAGIANESE, :  
ROBERT MICHAELSON, et al., :

76 Cr. 503 (KTD)

Defendants. :

-----X  
STATE OF NEW YORK )  
COUNTY OF NEW YORK ; ss.:  
SOUTHERN DISTRICT OF NEW YORK )

JAMES A. MOSS, being duly sworn, deposes and

says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and I am fully familiar with the facts and proceedings in the above-captioned action. I submit this affidavit in response to the motion of the defendant Michaelson, dated November 19, 1976, (a) to withdraw his plea of guilty entered herein on September 22, 1976 to Count Four of this indictment, and (b) to enter a plea of not guilty to that count.

2. The grounds which Michaelson offers in support of his motion are that (i) "My plea bargain agreement was breached", and (ii) "I was actually in fear and entrapped as I told this Court on the day of my plea." (Affidavit of Robert Michaelson, dated November 19, 1976, hereinafter "Michaelson Affidavit".)



THE GOVERNMENT HAS NOT  
BREACHED ITS "PLEA BARGAIN  
AGREEMENT" WITH MICHAELSON

3. The Government has not engaged in any "plea negotiations" in this case as suggested by Michaelson in his affidavit. Rather, the Government informed Michaelson prior to his guilty plea that it would not take any position with respect to the sentence Michaelson should receive, but that it would relate to the Probation Department and the Court whatever it knew of events that transpired during the course of this conspiracy.\*

4. Michaelson now claims that the Government "violated our agreement" when it gave the Probation Department an assessment of his relative culpability among the American defendants, and informed officers of the Probation Department that Michaelson was a "supervisor" of certain of his co-conspirators and a "link" between the co-conspirators and the underworld buyers. This claim is a patently frivolous attempt by Michaelson to second-guess his decision to plead guilty, in light of a pre-sentence report that obviously displeases him.

5. The Government's comments to the Probation Department that Michaelson supervised certain of his co-conspirators and acted as a link between others is merely an explanation of the occurrences that transpired within the operation of the conspiracy. As such, these comments are

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\* This position was related to Michaelson's attorney on September 22, 1976. It was in apparent reliance upon this position that Michaelson entered his guilty plea on that date. (See Michaelson Affidavit, ¶6.)



entirely within the understanding conveyed to Michaelson's attorney on September 22, 1976.

6. Moreover, the Government, by assessing for the Probation Department the relative culpability of each defendant, has not taken a position with respect to the sentence Michaelson or any other defendant should receive from the Court. Such an assessment of relative culpability is customarily sought from our Office by the Probation Department and, on occasion, by the Court in multi-defendant conspiracy cases. It represents a summarization of each defendant's contacts with the conspiracy relative to those contacts of his co-conspirators. It does not purport to assess any absolute degree of culpability, nor does it carry with it an actual or implied recommendation of sentence. The Government has not, and will not, take a position with respect to the sentence that any defendant in this case should receive.\*

MICHAELSON'S REFERENCE TO  
"DURESS" OR "ENTRAPMENT"  
DEFENSES HE MIGHT HAVE  
RAISED AT TRIAL IS INSUFFIC-  
IENT TO SUPPORT THE WITH-  
DRAWAL OF HIS GUILTY PLEA

7. There are at least two distinct reasons why Michaelson's reference in his affidavit to possible defenses

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\* So that the record may be entirely clear, the Government's assessment of the relative culpability of the defendants is not exactly as it appeared in the pre-sentence reports. It is the Government's position that among the five American defendants, Tobocman and Alvarez played lesser roles than did Michaelson, Geraldo and Cagianese. This two-tier evaluation is the extent of the Government's assessment of the relative culpability of these five defendants.



of duress and entrapment is insufficient to justify withdrawal of his plea of guilty. First, the evidence that was placed before the Court during the trial of this action clearly established that neither defense was available to Michaelson in this case. (For a fuller discussion of this point, see the accompanying Memorandum of Law on the Issues of Duress and Entrapment as Defenses.)

8. Additionally, at the time Michaelson pleaded guilty, his attorney acknowledged that he and his client had considered raising entrapment and duress as defenses at trial, but had concluded that proof of the elements of these defenses was lacking. Indeed, at the same time he pleaded guilty, Michaelson told the Court of his purported "fear" (see Michaelson Affidavit, ¶9), but entered the plea of guilty anyway "because in analyzing the evidence available to me, I realized that it would minimize my risks pursuant to a plea bargain struck by my attorney." (Michaelson Aff., ¶5.)

9. Thus, Michaelson's guilty plea was entered as the result of a knowledgeable decision on his part upon the advice of his counsel to forego dubious defenses.

10. In conclusion, Michaelson's resurrected desire to litigate these defenses--prompted, no doubt, by his obvious dissatisfaction with his pre-sentence report--is an insufficient reason for allowing the withdrawal of a knowing and voluntary plea of guilty. Defendant's motion should be denied in all respects.

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JAMES A. MOSS  
Assistant United States Attorney

Sworn to before me  
this        day of November, 1976.

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Notary Public



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ARGUMENT ON DEFENDANT'S MOTION - NOVEMBER 22, 1976



v  
Michaelson  
/22/76

Cr. 503

1 GW1

2 THE COURT: Robert Michaelson.

3 MR. SLOTNICK: May I be heard?

4 THE COURT: Yes.

5 MR. SLOTNICK: I may have to get closer to  
6 the bench. My voice is about to --

7 THE COURT: Mr. Fiske, if you want to hear it,  
8 come on up.

9 MR. SLOTNICK: It has not been easy to repre-  
10 sent Mr. Michaelson, your Honor. One can be torn with  
11 many thoughts with regard to a case of this type. I  
12 can only tell the Court the involvement as I know it  
13 and as I have interviewed people who were willing to  
14 come to this court and testify had this matter gone to  
15 trial.

16 Number one, Robert Michaelson never dealt in  
17 a gun or weapon in his entire life.

18 Number two, some time in March of 1975, as a  
19 result of his colleague being involved in what we believe  
20 still to be a perfectly legal matter, Michaelson received  
21 a phone call and was asked whether he had a corporation  
22 that was available that could be used in terms of a  
23 commitment so that Michaelson's friend, colleague, might  
24 receive the benefits of the commission on a deal he was  
25 to receive.



1 GW2

2 He said sure.

3 That's Bob Michaelson.

4 Some days later a document containing a  
5 list of arms and weapons appeared in Michaelson's office.  
6 It appeared on Michaelson's desk.

7 He had at this stage, your Honor, nothing to do  
8 with those guns and weapons.

9 During the course of the next few days, that  
10 document was taken off Mr. Michaelson's desk without  
11 his authority, without his knowledge, and I would have,  
12 had this matter gone to trial, produced witnesses who  
13 would have testified under oath as to what happened as  
14 a result of that as to the fact that that did occur and  
15 as to the fact that as a result of that occurrence  
16 Michaelson did things like changing the locks on his office  
17 to prevent other people from coming into his office.

18 That document was taken off his desk by Jim  
19 Gray, who testified in this court. I believe it was  
20 his testimony that Michaelson gave him the document. We  
21 are willing to rebut that and can, your Honor. I think  
22 his testimony would be much more credible than Mr. Gray's.

23 Mr. Gray then came back to Michaelson and he  
24 told him that "Vince Coppola would like to see you about  
25 these" -- waving that document.



1 Michaelson said, "No, I am not involved in  
2 that deal, I am not interested and I don't want to meet  
3 Vince Coppola."

4 Because, as far as Michaelson knew, Vince  
5 Coppola had some rather strange backgrounds.

6 He would have testified at the trial, your  
7 Honor, that Coppola called consistently and Michaelson  
8 avoided him consistently. Coppola called Michaelson  
9 at his home at his private unlisted number. Michaelson  
10 was irate at his secretary for giving out that number.

11 Coppola, in his constant calls to Michaelson,  
12 asked for him to meet his cousin, Tony. Finally,  
13 Coppola called Michaelson and said, "Wait a minute."  
14 And a rough, tough-sounding voice got on the phone. It  
15 was Tony.

16 He said to Michaelson, "I want you to meet  
17 me and you are going to meet me."

18 My client is a fat jellyfish. I have to say  
19 that in front of him. I am sorry if I have to embarrass  
20 him. And he went up and he met.

21 But before he met with one Tony Stagg, who we  
22 believed before trial, your Honor, was a government agent,  
23 apparently he was a real live gangster working for the  
24 government, prior to his meeting Tony Stagg he was told --  
25



1 GW4

2 Michaelson was told by Vince Coppola, "That's my cousin.  
3 He is the real McCoy. He is really organized crime.  
4 He is a big deal in organized crime. Talk to him. Be  
5 nice to him. Be careful what you say to him."

6 Your Honor has listened to the tape of March  
7 20, all of that. Bob Michaelson walked in, and we have  
8 done a stress evaluation of that tape. There is a lot of  
9 stress influence. And he sits down and he meets what he  
10 believes to be a real true-to-life gangster and what we  
11 believe at this point, after our investigation, was a  
12 true real-life gangster.

13 He gave Michaelson an offer he couldn't refuse  
14 because he told Michaelson things like -- remember one  
15 thing. Michaelson walked in at this stage of the game  
16 without ever having dealt in guns or weapons, and he said  
17 things to Michaelson, and they are on the tape, like,  
18 "You know, people who deal with me, if they don't do  
19 the right thing they end up in the desert," or words to  
20 that effect. I think your Honor is familiar with the  
21 transcript.

22 THE COURT: Yes.

23 MR. SLOTNICK: He also indicated to Michaelson,  
24 and through that tape, your Honor, you hear fear in this  
25 man's voice. Not only do you hear fear in his voice



1 GW5

2 but he keeps backing out: "I don't know too much about  
3 it; I don't know; I never dealt in guns in my life."

4 It is all on the tape.

5 At one point, Stagg turned to Michaelson and  
6 looked at him and said, "I guess you know who I am by  
7 now."

8 Michaelson said, "Yes, of course I do."

9 "I guess you recognize me from the newspapers."

10 "No."

11 I don't justify -- when Michaelson took his  
12 plea, he told your Honor that he was frightened to death.  
13 He indicated he was afraid. He told me he was frightened  
14 to death. He was afraid.

15 He also indicated that he knew he could have  
16 gone to the authorities at that time. He did go. He did  
17 go speak to one person, and then when he thought there  
18 was some interest he backed away. He was frightened to  
19 death.

20 At one point Stagg said to him on the tape:  
21 "And don't you check on me because if I find out you are  
22 checking on me, all of this."

23 Michaelson met up with a true live gangster  
24 and hoodlum and he was not only intimidated but he was  
25 scared, and if you listen to the tape and realize --  
get involved in some of the fascia and realize what



1 GW6

2 Michaelson is saying on the tape is pure gibberish, he  
3 talked about things that didn't exist.

4 I said to him, "Bob, why did you say that?"

5 He said, "I had to keep on talking. In my  
6 mind, I had one of the biggest secrets in organized crime  
7 in my head. My only concern was let me live, or my  
8 wife and children were going to be hurt."

9 As Michaelson alleges, he was warned before he  
10 met Stagg, and Stagg says it: "We are bigger than any  
11 government." He said, "Bob, there is no place you  
12 can hide." He was warned, "You have a wife, you have a  
13 family."

14 As a result of that, he goes on to the venture  
15 and as a result of that every time he can, and I don't  
16 admire him for this, Judge, but every time he can he  
17 lays off onto someone else to get out of the picture  
18 because, as we realized, during the short period of time  
19 that this conspiracy continued Bob Michaelson's appearances  
20 are only on request and very rare, and if one would  
21 listen to the tape, there generally is a comment about,  
22 "Why don't you come down here. I want you down here."

23 Michaelson tries to stay away as much as he  
24 can. Subjectively during that period of time he is a  
25 man living in a horror, he is a man living in a nightmare.



1 GW7

2 When the federal authorities entered that room of the  
3 motel and knocked on the door, the deal had been consummated  
4 and they walked in with shotguns and they said, "Federal  
5 authorities," Bob Michaelson said, "Well, that's it. I  
6 have served their purpose and now they are going to kill  
7 me."

8 When he left that house that night to go to the  
9 motel, he left and he told his wife, "Look, honey, I may  
10 not be home tomorrow," because he was scared to death.

11 And finally, only up at FBI headquarters did  
12 he finally realize that he was arrested, that he had been  
13 taken by the federal authorities, and he breathed a sigh  
14 of relief.

15 Someone said to him, in joking, thinking he knew  
16 and realized at that point about Stagg, but he did not:  
17 "You are probably safer in here than outside." And he  
18 worried about Stagg because in Michaelson's mind he had  
19 on March 20th been entrusted with one of the greatest  
20 secrets of organized crime that anyone could and he  
21 went along.

22 I don't justify that, your Honor. I say in  
23 mitigation, and I don't have to go into his family, his  
24 background, your Honor knows he has never had an involve-  
25 ment with the law. He has been financially destroyed.



1 GW8

2 He has lost his job as a result of this indictment. But  
3 for whatever it's worth, and it's difficult at sentence  
4 to say these things, but I think I am just constrained to  
5 do that, for whatever it's worth, had there not been a  
6 Tony Stagg and had there not been a Vince Coppola, Bob  
7 Michaelson would never have come here. He never would  
8 have been involved in a gun, a weapon or anything of that  
9 sort.

10 This did not start as an investigation of  
11 Michaelson and his activities. This started because,  
12 and I still don't know the answer to this because somewhere  
13 Jim Gray and Vince Coppola and ultimately Stagg were  
14 involved in looking for something, but it wasn't Michaelson.

15 I can tell you now, Judge, and your Honor has  
16 told me on sentencing to remember I am an officer of the  
17 court, and I haven't forgotten that, that my investigation  
18 makes me believe quite candidly that he was afraid.

19 We have gone through a period of time in this  
20 country where store owners did dumb things because they  
21 were afraid. I remember the tail end of that period.  
22 Bob Michaelson had the same fear.

23 I ask your Honor to look at him and consider  
24 the facts as they are and to grace him with some pity  
25 because at this stage of his life he is not only standing



1 GW9

2 in a rather serious situation and a very sad situation  
3 but he is literally destroyed.

4 Again, he comes to the court fired from his  
5 job, hopelessly in debt and he asks the Court to give  
6 him that modicum of American justice that he is entitled  
7 to. I would ask your Honor to seriously consider,  
8 although I know your Honor has, to seriously consider his  
9 plight.

10 THE COURT: Do you have anything to say?

11 MR. FISKE: All I would say is your Honor has  
12 had the benefit of the testimony at the trial of this case,  
13 including listening to tapes that include Mr. Michaelson's  
14 participation. I believe the Court will be able to  
15 form its own judgment with respect to what Mr. Slotnick  
16 has said. It is the government's position that we do  
17 not agree with it and we think that the evidence before  
18 the Court bears us out.

19 THE COURT: Mr. Michaelson, do you want to be  
20 heard?

21 DEFENDANT MICHAELSON: I lived in that fear.  
22 That's all.

23 THE COURT: You have four kids?

24 DEFENDANT MICHAELSON: Yes.

25 THE COURT: It is the judgment of this Court



1 GW10

2 that you will be remanded to the custody of the Attorney  
3 General for a period not to exceed five years. Surrender  
4 will be Friday.

5 MR. SLOTNICK: Will your Honor grant the  
6 defendant bail pending appeal in view of the motions he  
7 has made?

8 THE COURT: No, I think they are totally without  
9 substance. I see no reason for bail pending appeal.

10 MR. SLOTNICK: Thank you, your Honor.

11 - - -



ENDORSEMENT  
76 CR. 503

The motion is denied. See transcript of November 22, 1976.  
SO ORDERED.

s/Kevin Thomas Duffy, U.S.D.J.

New York, New York  
November 22, 1976.

FILED  
U.S. DISTRICT COURT  
NOV. 23, 1976  
S.D.N.Y.



A-66

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

FILED  
U.S. District Court  
Nov. 30, 1976  
S.D. of N.Y.

UNITED STATES OF AMERICA

- against -

ROBERT MICHAELSON, et. al.,

Defendant.

NOTICE OF APPEAL

76 CR 503  
(KTD)

Notice is hereby given that ROBERT MICHAELSON, defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgement of conviction and the sentence entered in this action, as well as the denial of defendant's motion for withdrawal of plea of guilty pursuant to Federal Rule of Criminal Procedure 32(d), all entered in this action on the 22nd day of November, 1976.

Dated: New York, New York  
November 23, 1976

BARRY IVAN SLOTNICK  
Attorney for Defendant  
233 Broadway  
New York, New York 10007  
(212) 964-3200



SLOTNICK

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec. ,1976 at No. 225 Cadman Plaza East., Brooklyn, NY

deponent served the within *Appendix*  
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true  
copy(ies) thereof to him personally. Deponent knew the person so  
served to be the person mentioned and described in said papers as the  
appellee therein.

Sworn to before me this  
20 day of Dec. 1976.

*William Bailey*  
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1978

*Edward Bailey*  
Edward Bailey



